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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

No. 71-1450

ROBERT E. POFF, doing business as 1st King,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

McPHERSON BERRIEN E. MOORE,
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TOPICAL INDEX

	Page
Table of Authorities	iii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	10
REASONS RELIED ON FOR ALLOWANCE OF WRIT	15
I. PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL FAILED TO GIVE HIM NOTICE OR AN OPPORTUNITY TO BE HEARD BEFORE ISSUING ITS SECOND DECISION	15
A. The Second Decision of ABC Was Not Restricted by the First Decision of ABC or by the Partial Affirmance Thereof by the Appeals Board	15
B. Petitioner Was Denied Due Process In This Case	20
CONCLUSION	22

APPENDIX A

Decision of Department of Alcoholic Beverage Control, April 23, 1970 (First Decision)

APPENDIX B

Decision and Opinion of Alcoholic Beverage Control Appeals Board, July 23, 1971 (First Opinion)

APPENDIX C

Decision After Appeals Board Decision of Department of Alcoholic Beverage Control, August 3, 1971 (Second Decision)

APPENDIX D

Decision and Opinion of Alcoholic Beverage Control Appeals Board, January 12, 1972 (Second Opinion)

APPENDIX E

Order of Court of Appeals Denying Petition for writ of review, dated Feb. 17, 1972

APPENDIX F

Order of Supreme Court denying hearing dated Mar. 16, 1972

TABLE OF AUTHORITIES

Cases

	Page
Bell v. Burson (1971) 402 U.S. 535	20
Hasselbach v. Department of Alcoholic Beverage Control (1958) 167 Cal.App.2d 662 334 P.2d 1058	16
Hohreiter v. Garrison 81 Cal.App.2d 384 184 P.2d 323	19
Leeds v. Grey (1952) 109 Cal.App.2d 874 242 P.2d 48	19
Opp Cotton Mills, Inc. v. Administrator (1941) 312 U.S. 126	20
Wisconsin v. Constantineau (1971) 400 U.S. 433	20
Yanke v. State Department of Public Health (1958) 162 Cal.App.2d 600 328 P.2d 556	19

Codes

Business and Professions Code	
§11517(c)	18, 19
§23077	5
§23082	5

Codes

	Page
Business and Professions Code	
§23083	15
§23084	6, 15
§23084(d)	15
§23084(e)	15
§23085	5, 16
§23090	18
§24200(a)	11, 12
Government Code	
§11517	8
28 U.S.C.	
§1257(3)	2

Constitution

California Constitution	3, 11, 12, 15, 16
Article XX, §22	3, 11, 12, 15, 16
U.S. Constitution	
Fifth Amendment	20
Fourteenth Amendment	20

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OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

Petitioner, ROBERT E. POFF, respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Court of Appeals of the State of California entered in the above matter on February 17, 1972.

OPINIONS BELOW

The written decision of the Department of Alcoholic Beverage Control suspending Petitioner's license for 60 days with 30 days of said suspension stayed upon certain terms and conditions is set forth in Appendix C. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth in Appendix D. The order of the Court of Appeals denying a Petition for Writ of Review was made without opinion. (Appendix E) The order of the Supreme Court of the State of California denying a hearing was also made without opinion. (Appendix F).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Is it a denial of due process for the California Department of Alcoholic Beverage Control to issue a decision in a case which has been remanded to it after appeal without affording Petitioner a new hearing or

opportunity to make oral or written argument?

STATUTORY PROVISIONS INVOLVED

Article XX Section 22 of the California Constitution, which provides in relevant part:

> "When any person aggrieved thereby appeals from a decision of the Department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the Board [Alcoholic Beverage Control Appeals Board] shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the Board shall not receive evidence in addition to that considered by the Department. Review by the Board of a decision of the Department shall be limited to the questions whether the Department has proceeded without or in excess of its jurisdiction,

whether the Department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the Board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the Department it may enter an order remanding the matter to the Department for reconsideration in the light of such evidence. In all other appeals the Board shall enter an order either affirming or reversing the decision of the Department. When the order reverses the decision of the Department, the Board may direct the reconsideration of the matter in the light of its order and may direct the Department to take such further action as is specially enjoined

upon it by law, but the order shall not limit or control in any way the discretion vested by law in the Department. Orders of the Board shall be subjected to judicial review upon petition of the director or any party aggrieved by such order."

California Business and Professions Code Section 23077:

"The Alcoholic Beverage Control Appeals Board shall exercise such powers as are vested in it by Section 22 of Article XX of the Constitution and may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required."

Business and Professions Code Section 23082.

"The Board shall determine the appeal upon the record of the Department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear

before the Board, the Board shall fix a time and place for argument. The Board shall not receive any evidence other than that contained in the record of the proceedings of the Department.

Business and Professions Code Section 23084:

"The review by the Board of a decision of the Department shall be limited to the questions:

(a) Whether the Department has proceeded without, or in excess of its jurisdiction.

(b) Whether the Department has proceeded in the manner required by law.

(c) Whether the decision is supported by the findings.

(d) Whether the findings are supported by substantial evidence in the light of the whole record.

(e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced

or which was improperly excluded at the hearing before the Department.

California Business and Professions Code Section 23085:

"In appeals where the Board finds that there is relevant evidence which in the exercise of reasonable diligence could not have been produced or which was improperly excluded at the hearing before the Department, it may enter an order remanding the matter to the Department for reconsideration in the light of such evidence. In all other appeals the Board shall enter an order either affirming or reversing the decision of the Department. When the order reverses the decision of the Department, the Board may direct the reconsideration of the matter in the light of its order and may direct the Department to take such further action as is specially enjoined upon it by

law, but the order shall not limit or control in any way the discretion vested by law in the Department."

California Government Code Section 11517:

> (a) If a contested case is heard before an agency itself the Hearing Officer who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.
>
> (b) If a contested case is heard by a Hearing Officer alone, he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record and a copy of

the proposed decision shall be served by the agency on each party in the case and its attorney. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in sub-division (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in sub-division (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of such

proposed decisions shall be furnished to each party and his attorney as prescribed by sub-division (b). The agency itself shall decide no case provided for in the sub-division without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself no agency member may vote unless he heard the additional oral evidence.

STATEMENT OF THE CASE

Petitioner, ROBERT E. POFF, has been and now is the holder of a bonafide on-sale general license issued by Respondent Department of Alcoholic Beverage Control permitting him to engage in the activities permitted by said license at 14401-14403 S. Western Avenue, Gardena, California. Said premises are known as and do business as the "1st King".

On October 9, 1969 Respondent Department of Alcoholic Beverage Control (ABC) filed an accusation against Petitioner which alleged that he had permitted or suffered his licensed premises to be used in a manner contrary to public welfare or morals. The accusation alleged that on five separate occasions female entertainers had performed on the stage at Petitioner's licensed premises while completely nude. The accusation further alleged that the acts specified therein were cause for suspension or revocation of Petitioner's license pursuant to Article XX, §22 of the Constitution of the State of California and §24200(a) of the Business and Professions Code of the State of California, in that said acts were contrary to public welfare or morals.

On November 3, 1969 Petitioner filed his notice of defense pursuant to the provisions of the California Administrative Procedure Act.

On February 10, 1970 a hearing on the accusation was held before George K. Bellows, a Hearing Officer of the Office of Administrative Procedure, duly appointed

to hear the case.

On April 13, 1970 the hearing officer submitted his proposed decision to ABC. On April 23, 1970 ABC adopted the proposed decision as its own. Said decision found that Petitioner had permitted and suffered the acts described in the accusation to take place, that grounds for the suspension and revocation of Petitioner's license had been established under Article XX, §22 of the California Constitution, and §24200(a) of the Business and Professions Code, and that as a result thereof Petitioner's license was revoked. A true and correct copy of said decision and proposed decision is attached hereto as Appendix A.

On June 4, 1970, Petitioner filed a notice of appeal from the decision to Respondent Alcoholic Beverage Control Appeals Board (Appeals Board). Following submission of written briefs by Petitioner and by ABC, a hearing was held by the Appeals Board on February 23, 1971.

On July 23, 1971 the Appeals Board issued its written decision affirming the decision of ABC in part and reversing said

decision in part, and remanding the matter to ABC for reconsideration of the penalty. A true and correct copy of said decision is attached hereto as Appendix B.

On August 3, 1971 ABC issued a "Decision Following Appeals Board Decision", a true and correct copy of which is attached hereto as Appendix C. Said decision readopted that part of the original decision which had been affirmed by the Appeals Board and ordered that Petitioner's license be suspended for 60 days, of which 30 days was stayed upon certain probationary conditions. Said "Decision Following Appeals Board Decision" was made and issued without any prior notice to Petitioner and without affording Petitioner an opportunity to be heard or to submit written argument.

On September 3, 1971 Petitioner filed a petition for reconsideration of said "Decision Following Appeals Board Decision". Said petition was based in part upon the ground that Petitioner had not been granted a hearing or a chance to submit written argument prior to the adoption of said "Decision Following Appeals Board

Decision". The petition for reconsideration was denied by ABC on September 7, 1971.

On September 9, 1971 Petitioner filed a notice of appeal with the Alcoholic Beverage Control Appeals Board. On January 12, 1972, having first received the written briefs of the parties that heard and considered oral argument, the Appeals Board issued its decision affirming the Department's "Decision Following Appeals Board Decision". A true and correct copy of said decision is attached hereto as Appendix D.

For ease of reference we shall hereinafter refer to the Two decisions of ABC as being the first and second decisions, and similarly refer to the two opinions of the Appeals Board as being the first and second opinions.

On February 11, 1972 Petitioner filed a Petition for Writ of Review with the Court of Appeal of the State of California, Second Appellate District. On February 17, 1972 Petitioner's Petition for Writ of Review was denied. (Appendix E).

On February 25, 1972 Petitioner filed

a Petition for Hearing to the Supreme Court of the State of California. On March 16, 1972 Petitioner's Petition for Hearing was denied. (Appendix F). Both of said denials were made without opinion.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL FAILED TO GIVE HIM NOTICE OR AN OPPORTUNITY TO BE HEARD BEFORE ISSUING ITS SECOND DECISION.

A. The Second Decision of ABC Was Not Restricted by the First Decision of ABC or by the Partial Affirmance Thereof by the Appeals Board.

We start with the proposition that the Appeals Board is an appellate tribunal of limited jurisdiction. That jurisdiction is specified in Article XX, §22 of the California Constitution and in §§23803 and 23804 of the California Business and Professions Code. Thus, under sub-paragraphs (d) and (e) of §23084 the Appeals Board has jurisdiction to determine whether the

Department's findings are supported by substantial evidence in the light of the whole record and whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the Department. However, this limited power does not authorize the Appeals Board to make findings of fact and a determination by it that ABC's decision was or was not supported by substantial evidence does not constitute such a finding. Hasselbach v. Department of Alcoholic Beverage Control, 167 Cal.App. 2d 662, 334 P.2d 1058 (1958).

Thus, §23085 of the Business and Professions Code and Article XX, §22 of the Constitution of the State of California both provide as follows:

> "In appeals where the Board finds that there is relevant evidence which, in exercise of reasonable diligence could not have been produced or which was improperly excluded at the hearing before the Department, it may enter an order remanding the matter to the

Department for reconsideration in the light of such evidence. In all other appeals, the Board shall enter an order either affirming or reversing the decision of the Department. When the order reverses the decision of the Department, the Board may direct the reconsideration of the matter in the light of its order and may direct the Department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the Department."

Thus, the effect of a decision by the Appeals Board which affirms and reverses in part is to declare the prior decision of the Department a nullity. The prior decision is reversed and of no effect. Since the Appeals Board cannot make a finding of fact and cannot control the discretion of the Department, the Department would not be required to readopt those findings which had been affirmed by the Appeals Board if it did not feel such a finding was proper

in light of the changed circumstances in the case. Indeed, the Department could order a new hearing and start all over again. The Appeals Board cannot control or direct the Department to proceed in any other manner than the manner prescribed by law.

Upon remand, the Department has several alternatives open to it. It can of course appeal the order of reversal by filing a Petition for Wirt of Review under §23090 of the California Business and Professions Code, although it did not choose to do so in the instant case. It could make new findings itself based upon the administrative record, as it did do in the instant case, or it could return the matter to the hearing officer for the taking of further evidence. In no case would it be bound to make once again the same findings that were affirmed by the Appeals Board.

It appears to Petitioner that the second Department decision fell within the provisions of §11517(c) of the California Business and Professions Code. This is because the decision was based upon the record of an administrative hearing before a hearing officer, but was different from

that proposed by the hearing officer who heard the evidence. Under §11517(c) the Department should have afforded Petitioner an opportunity to present either oral or written argument before making the decision. Moreover, the Department's second decision recites that the Department had reconsidered the entire record including the transcript of the hearing prior to deciding the case itself. The Department did not purport to merely reaffirm that part of its decision which had been affirmed by the Appeals Board. However, Petitioner's interpretation of state law appears to have been rejected by the California Supreme Court in this case. But, c.f. Leeds v. Grey, 109 Cal.App.2d 874, 242 P.2d 48 (1952); Yanke v. State Department of Public Health, 162 Cal.App.2d 600, 328 P.2d 556 (1958); Hohreiter v. Garrison, 81 Cal.App. 2d 384, 184 P.2d 323. However, even if valid under state law, the procedure in this case violates basic principles of due process.

B. Petitioner Was Denied Due Process In This Case.

It is elementary that Petitioner's right to due process of law under the Fifth and Fourteenth Amendment comprises in this case the right to notice of proceedings against him and the right to a meaningful opportunity to a hearing which is appropriate to the nature of the case. Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941). In the instant case the Appeals Board reversed the decision of the Department and remanded it for further consideration. As already observed, several alternatives were then open to the Department, ranging from dismissal of the case to a new order of revocation. The Department decided the case for itself upon the existing record without notice to Petitioner and without giving Petitioner any opportunity to appear or to submit written arguments. Thus, Petitioner was deprived of the opportunity to argue whether or not the remaining charges against him justified the

imposition of disciplinary action and, if so, what the appropriate penalty should be in the case. Since the Appeals Board and the courts can only reverse for abuse of discretion, Petitioner's subsequent appeal to that Board and subsequent Petition for Writ of Review did not amount to an opportunity for a hearing on the propriety of the penalty, except insofar as the penalty might arguably amount to a total abuse of discretion. Thus, the issue of the proper penalty under the new findings of fact has been decided by one of the parties, the Department, without the benefit of appearance or argument by the other.

It is true that Petitioner did have a hearing on February 10, 1970, before a hearing officer of the Office of Administrative Procedure, and that a transcript of that hearing was available to the Department at the time it made its second decision. However, as a result of the intervening decision of the Appeals Board, the charges against Petitioner had in effect been altered. It is as if a trial court to which a case has been remanded after a

successful appeal could sentence the defendant based on the record of the first trial without the defendant's consent or knowledge. This procedure clearly violates the basic tenets of due process and justifies the issuance of a Writ of Certiorari and of a judgment reversing said decision.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

McPHERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ

Attorneys for Petitioner

APPENDIX A

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

File 1867
Reg. 9049

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommended penalty, adopted said proposed decision as its decision in the case therein described on April 23, 1970.

A representative of the Department will call on you on or after June 11, 1970, to pick up the license certificate.

Sacramento, California
Dated: April 23, 1970

Dorothy Pierson
Hearing and Legal Unit

ABC-132 (1-67)

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

280 Folios

In the Matter of the Accusation Against:	File 1867 Reg. 9049
Robert E. Poff First King 14401-03 South Western Avenue Gardena, California	Licenses: 47 Time of Hearing: 2-10-70 9:00 a.m. Place of Hearing: 314 W. First St., L.A. Reporter: JoAnn Crawford OLA 22267
On-sale General Bona Fide Public Eating Place	Appearances: For Dept: Marguerite Geftakys Assoc. Counsel
	For Resp: Berrien E. Moore, Attorney 1515 Redondo Beach Blvd. Gardena, Calif. 90247
under the Alcoholic Beverage Control Act.	

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given according to law, and I hereby recommend its adoption as the decision of

Department of Alcoholic Beverage Control.

PROPOSED DECISION

COUNT I

It is true that on the dates set forth below respondent directly and by and through his agents, employees and servants did permit and suffer his above-licensed premises to be used in a manner more particularly described below which created conditions on said premises which were contrary to public welfare and morals within the meaning of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Alcoholic Beverage Control Act, in that:

1. On September 11, 1969, at approximately 7:45 p.m. thereof, respondent did use the services of a female entertainer, Patricia Ann Holly, to perform on the stage area in the above said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, the lips of her vagina, and bare buttocks to the view of persons present in said premises.

a. While said entertainer was completely nude and with her feet about three feet apart, she pumped her private parts toward a patron seated at the stage, bringing her pubic area to about eighteen inches of his face, and extended her arms toward him and motioned him to come closer. He then reached out with his right hand and with the middle finger extended came to within one or two inches of her pubic area at which time she laughed, jumped back, and said "come up here, baby."

b. While said entertainer was completely nude, she placed her right hand in her vaginal area and moved her hand in and out while her legs were spread.

c. While said entertainer was completely nude, she licked the index finger of her right hand and ran it around the nipple of one breast and then the other while her head was tilted back, her eyes closed, and her tonger was against her upper lips.

d. While said entertainer was completely nude and conducting the above activities, she stated "baby, it feels so good."

e. While said entertainer was completely nude, she squatted near the edge of the stage with her feet apart, exposing her vaginal lips and with her hands stretched out pumped her pubic area back and forth. While so doing, patrons stated "Come a little closer so I can get a better look at it", "Let me put a dollar in it", and "Come here where I can sniff it."

2. On September 11, 1969, at approximately 8:15 p.m. thereof, respondent did use the services of a female entertainer, Mary Jo Frazell, to perform on the stage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic area, vaginal lips, and bare buttocks to the view of persons present in said premises. She would position herself in front of various patrons and as she approached would girate and pump her hips and with her hands outstretched would squat, thus exposing her vaginal lips, and girate her hips.

3. On September 19, 1969, at about midnight thereof, respondent did use the services of a female entertainer, Patricia

Ann Holly, to perform on the atage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, vaginal lips, and bare buttocks to the view of persons present in said premises. She would move up and down the stage moving her hips and with her arms in the air would twirl her breasts, spread her feet eighteen inches to twenty-four inches apart at times, thus exposing her vaginal lips, and would lean over with her hands on her knees and legs apart and rotate her hips.

4. On September 20, 1969, shortly after midnight thereof, respondent did use the services of a female entertainer, Patricia Ann Holly, to perform on the stage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, vaginal lips, and bare buttocks to the view of persons present in said premises. On one occasion, she turned her back to the patrons, spread her legs, and looked through her legs, thus exposing her vaginal lips.

5. On September 23, 1968, at approximately 8:45 p.m. thereof, respondent did use the services of a female entertainer, Teresa Zavala, to perform on the stage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, vaginal lips and bare buttocks to the view of persons present in said premises.

* * * * * * * * *

There are signs on the exterior of the premises reading in substance "Bottomless Revue" and "Total Nudity" and there is an admission charge of $1.00. The stage is about eighteen inches above the floor against one wall of the premises, and it is about eight feet by twelve feet. Behind it on the wall is a mirror about eight feet by eight feet. Around the stage are chairs with a small area separating the chairs from the stage which is used to place drinks.

LICENSEE'S PRIOR RECORD:

Not before Hearing Officer.

DETERMINATION OF ISSUES PRESENTED:

Count I: Grounds for the suspension or revocation of respondent's license under Section 24200(a) of the Alcoholic Beverage Control Act and within the meaning of Article XX, Section 22 of the California Constitution were established.

PENALTY OR RECOMMENDATION:

The license is revoked.

Dated at Los Angeles, California, April 13, 1970.

George K. Bellows

GEORGE K. BELLOWS, Hearing Officer
Office of Administrative Procedure

APPENDIX B

FILED
Jul 23 1971

Alcoholic Beverage
Control Appeals Board

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against ROBERT E. POFF dba First King 14401-03 South Western Avenue Gardena, California Respondent & Licensee under the Alcoholic Beverage Control Act	AB-3451 File No. 1867; Reg. No. 9049 Time & Place of Hearing: February 23, 1971, at 2 p.m. 107 South Broadway Los Angeles, Calif. For Department: Honorable Evelle J. Younger Attorney General Edward Duddy Deputy Attorney General For Appellant: Kenneth Scholtz, Esq.

Appellant Robert E. Poff, doing business as First King, 14401-03 South Western Avenue, Gardena, is the holder of an on-sale beer license issued by the Department of Alcoholic Beverage Control. On October 17, 1969, the department filed an accusation against the licensed premises alleging

that the licensee had permitted conduct and activity to occur on the licensed premises which was contrary to public welfare or morals within the meaning of article XX, section 22 of the California Constitution and section 24200(a), Business and Professions Code. Following a hearing on the accusation the hearing officer prepared a proposed decision in which he recommended revocation of appellant's license. The proposed decision was adopted by the department and provides the following:

"COUNT I

"It is true that on the dates set forth below respondent directly and by and through his agents, employees and servants did permit and suffer his above-licensed premises to be used in a manner more particularly described below which created conditions on said premises which were contrary to public welfare and morals within the meaning of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Alcoholic Beverage Control Act, in that:

"1. On September 11, 1969, at approximately 7:45 p.m. thereof, respondent did use the services of a female entertainer, Patricia Ann Holly, to perform on the stage area in the above said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, the lips of her vagina, and bare buttocks to the view of persons present in said premises.

"a. While said entertainer was completely nude and with her feet about three feet apart, she pumped her private parts toward a patron seated at the stage, bringing her pubic area to about eighteen inches of his face, and extended her arms toward him and motioned him to come closer. He then reached out with his right hand and with the middle finger extended came to within one or two inches of her pubic area at which time she laughed, jumped back, and said 'come up here, baby.'

"b. While said entertainer was completely nude, she placed her right hand in her vaginal area and moved her hand in and out while her legs were spread.

"c. While said entertainer was completely nude, she licked the index finger of her right hand and ran it around the nipple of one breast and then the other while her head was tilted back, her eyes closed, and her tongue was against her upper lips.

"d. While said entertainer was completely nude and conducting the above activities, she stated 'baby, it feels so good.'

"e. While said entertainer was completely nude, she squatted near the edge of the stage with her feet apart, exposing her vaginal lips and with her hands stretched out pumped her pubic area back and forth. While so doing, patrons stated 'Come a little closer so I can get a better look it it', 'Let me put a dollar in it', and 'Come

here where I can sniff it.'

"2. On September 11, 1969, at approximately 8:15 p.m. thereof, respondent did use the services of a female entertainer, Mary Jo Frazell, to perform on the stage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic area, vaginal lips, and bare buttocks to the view of persons present in said premises. She would position herself in front of various patrons and as she approached would gyrate and pump her hips and with her hands outstretched would squat, thus exposing her vaginal lips, and gyrate her hips.

"3. On September 19, 1969, at about midnight thereof, respondent did use the services of a female entertainer, Patricia Ann Holly, to perform on the stage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, vaginal lips, and bare buttocks to the view of persons present in said

premises. She would move up and down the stage moving her hips and with her arms in the air would twirl her breasts, spread her feet eighteen inches to twenty-four inches apart at times, thus exposing her vaginal lips, and would lean over with her hands on her knees and legs apart and rotate her hips.

"4. On September 20, 1969, shortly after midnight thereof, respondent did use the services of a female entertainer, Patricia Ann Holly, to perform on the stage area in said premises while completely nude, therby indecently exposing her private parts, including her pubic hair, vaginal lips, and bare buttocks to the view of persons present in said premises. On one occasion, she turned her back to the patrons, spread her legs, and looked through her legs, thus exposing her vaginal lips.

"5. On September 23, 1969, at approximately 8:45 p.m. thereof, respondent did use the services of

of a female entertainer, Teresa Zavala, to perform on the stage area in said premises while completely nude, thereby indecently exposing her private parts, including her pubic hair, vaginal lips, and bare buttocks to the view of persons present in said premises."

* * *

"There are signs on the exterior of the premises reading in substance 'Bottomless Revue' and 'Total Nudity' and there is an admission charge of $1.00. The stage is about eighteen inches above the floor against one wall of the premises, and it is about eight feet by twelve feet. Behind it on the wall is a mirror about eight feet by eight feet. Around the stage are chairs with a small area separating the chairs from the stage which is used to place drinks.

"DETERMINATION OF ISSUES PRESENTED:

"Count I: Grounds for the suspension or revocation of respondent's license under Section 24200(a) of the Alcoholic Beverage Control Act and

within the meaning of Article XX, Section 22 of the California Constitution were established."

The record shows that appellant on or about May 23, 1970, filed a petition for reconsideration which was denied by the department on May 26, 1970. A timely appeal was filed with this board and is based upon the following grounds:

"(a) The Department has proceeded without, and in excess of, its jurisdiction;

"(b) The decision is not supported by the findings;

"(c) That errors of law were made by the Hearing Officer, as reflected by the transcript of the proceedings;

"(d) The findings are not supported by substantial evidence in the light of the whole record."

The record in this matter contains the testimony of Los Angeles County Deputy Sheriffs Ernest Roop, Gary Stephens, Floyd Johnson, Joe Davis, and George Koga. The

deputies testified as to observations that they made at appellant's premises. A diagram of the premises was introduced into evidence. (Department exhibit 1.) Appellant offered no evidence refuting the incidents set forth in the department's accusation.

Based upon the testimony of the deputies, it is the opinion of this board that the record contains substantial evidence supportive of the department's findings.

It would appear that appellant's primary attack is directed to the contention that the department has exceeded its jurisdiction as there was no showing by the department that the entertainment (nude dancers) affected public welfare or morals. In extensive argument, appellant raises the following issues in support of his position:

(1) Article XX, section 22 of the California Constitution which permits the department to revoke or suspend a license for conduct "contrary to public welfare or morals" is unconstitutionally broad when applied to speech and expression protected by the First Amendment.

A. A valid governmental purpose may not be achieved by means that restrict the exercise of constitutionally protected speech.

Appellant argues that the department has revoked appellant's license because he permitted entertainment which was not found to be obscene and was therefore protected by the First Amendment.

B. The constitutional prohibition against overbroad regulations is not limited to penal statutes.

Under this point appellant argues that the mere fact that this case involves the issuance and regulation of licenses for the sale of alcoholic beverages does not mean that the department is free to ignore the strictures of the First Amendment.

C. The department's power to suspend or revoke licenses for conduct contrary to public welfare or morals is unconstitutionally broad as applied in this case.

Appellant argues that with respect to the performance of a dance that such form of expression prima facie enjoys protection

of the First Amendment of the U.S. Constitution and only loses such protection upon a showing of obscenity; and that in this case the department did not allege that any of the conduct was lewd or obscene and that no violation of the Penal Code was alleged to have occurred.

(2) The decision of the department is not supported by substantial evidence in light of the whole record or by the findings nor does the evidence contain facts tending to show that the acts complained of were contrary to public welfare or morals.

Under this heading appellant argues that it is well settled that neither nudity nor depiction nor display of sexual activities are necessarily obscene (In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655); that activities of bare-breasted waitresses are not necessarily lewd or obscene (Robbins v. County of Los Angeles, 248 Cal.App.2d 1, 56 Cal.Rptr. 853). The depiction of nudity in photographs and pictures is granted constitutional protection (In re Panchot, 70 Cal.2d 105; People v. Rosakos, 268 Cal. App.2d 497; People v. Noroff, 67 Cal.2d 791). It is also argued that forms of

entertainment or communication which contain depictions of sexual acts are also not obscene on their face (Jacobellis v. Ohio, 378 U.S. 184). It is also pointed out that simulated sexual acts performed by actors during the course of a play are not necessarily lewd and must be considered with regard to the entire context of the play. (Dixon v. Municipal Court, 267 Cal.App.2d 789; Barrows v. Municipal Court, 1 Cal.3d 825.)

Appellant contends that the record does not contain evidence sufficient to establish that any of the dancers were obscene; that with respect to subcounts 2 through 5 the record discloses only that the dancer was nude and, as an inevitable consequence thereof, her pubic area could be seen as she moved about. It is also argued that there is no evidence concerning the nature of the performance as a whole; therefore, the evidence does not make possible a determination as to whether the predominant interest of the performance taken as a whole is to purient interests, whether the performance as a whole goes substantially beyond customary standards, and whether the

performance as a whole is substantially without redeeming social importance. There being no evidence in the record as to the nature of the performance as a whole, a finding that the performances were obscene would clearly be unjustified.

As acknowledged by appellant, we are not here concerned with the finding or determination that the performances were obscene. Furthermore, we are not concerned with the finding that the conduct on the premises was in violation of a penal statute. We are here concerned with the finding that the conduct on the premises was contrary to public welfare or morals within the meaning of article XX, section 22 of the California Constitution and section 24200(a), Business and Professions Code.

With respect to the conduct set forth in count I, subcounts 1(a), 1(b), 1(c), 1(d) and 1(e), the record indicates more than nude dancing. In our opinion the conduct set forth in the findings is of a type that belongs to a classification which this board has held to be within the ambit of close regulation by the department on

the basis of article XX, section 22 of the California Constitution and section 24200(a), Business and Professions Code. In our opinion the type of conduct set forth in count I, subcounts 1(a) - 1(e), clearly constitutes conduct contrary to public welfare or morals and subjects the licensee to disciplinary action. Department's decision is affirmed as to count I, subcounts 1(a), 1(b), 1(c), 1(d) and 1(e).

Based upon the re cord before us, the only conduct by the entertainers relative to subcounts 2, 3, 4 and 5 was nude dancing. It is the opinion of this board that such conduct alone does not constitute good cause for the imposition of sanctions. (See AB-3528 and AB-3437, Darin; Boreta Enterprises Inc. v. Department of Alcoholic Bev. Control, 2 Cal.3d 85; Glancy v. County of Sacramento, 17 Cal.App.3d 504.) This board has previously held that based upon judicial expressions expostulated in a number of recent decisions, we must hold that the action of the department cannot be approved on the basis that nude female entertainers dancing on a stage are per se contrary to public morals.

Based upon the foregoing, we affirm Count I, subcounts 1(a), 1(b), 1(c), 1(d) and 1(e) and reverse Count I, subcounts 2, through 5. The matter is remanded to the department for reconsideration of the penalty. (Bonham v. McConnell, 45 Cal.2d 304, 288 P.2d 502.)

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD

We Concur:

Eugene V. Lipp
Kay Valory

Sacramento, California
July 23, 1971

APPENDIX C

APPENDIX C

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against Robert E. Poff First King 14401-03 South Western Avenue Gardena On-sale general license under the Alcoholic Beverage Control Act.	)	File 1867 Reg. 9049

DECISION FOLLOWING APPEALS
BOARD DECISION

The above-entitled matter having come before the Department on August 3, 1971, following a decision of the Alcoholic Beverage Control Appeals Board, which affirmed in part and reversed in part the Department's decision in said matter, and the Department having reconsidered the entire record, including the transcript of the hearing held before Hearing Officer George K. Bellows on February 10, 1970, and good cause appearing therefor, it is ordered that the following

be, and it is hereby adopted as the decision of the Department:

FINDINGS OF FACT AND LICENSEE'S PRIOR RECORD

The Findings of Fact and Licensee's Prior Record as set forth in the Department's decision of April 23, 1970 are adopted herein as the Findings of Fact and Licensee's Prior Record for this decision, and by this reference are incorporated as if set forth in full.

DETERMINATION OF ISSUES PRESENTED

Count I, Subcounts 1(a), 1(b), 1(c), 1(d), and 1(e): Grounds for the suspension or revocation of the license exist under Section 24200(a) of the Alcoholic Beverage Control Act, and within the meaning of Article XX, Section 22, of the California Constitution.

Count I, Subcounts 2, 3, 4, and 5: These subcounts should be dismissed.

ORDER

Count I, Subcounts 1(a), 1(b), 1(c), 1(d), and 1(e): The license is suspended for 60

days with 30 days of said suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made the Director of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty; and that should no such determination be made, the stay shall become permanent.

Count I, Subcounts 2, 3, 4, and 5: These subcounts are dismissed.

CERTIFICATION

It is hereby certified that on August 3, 1971 the Department of Alcoholic Beverage Control adopted the foregoing as its decision in the proceeding therein described.

A representative of the Department will call on you on or after September 23, 1971 to pick up the license certificate.

Sacramento, California

Dated: August 3, 1971

C. E. Cameron, Jr.

C. E. CAMERON, JR.
Principal Counsel

APPENDIX D

Filed Jan 12, 1972
Alcoholic Beverage
Control Appeals Board

BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against	) AB-3451a)File No. 1867;)Reg. No. 9049;)H/O: Bellows)Time & Place of)Hearing:)October 29, 1971,)at 10 a.m.)314 West First)Street, Los)Angeles, California))For Department:)Honorable Evelle J.)Younger, Attorney)General)Talmadge R. Jones)Deputy Attorney)General))For Appellant:)Kenneth Scholtz, Esq.
ROBERT E. POFF, dba First King 14401-03 S. Western Avenue, Gardena	
Respondent & Licensee	
under the Alcoholic Beverage Control Act.	

In a previous decision (AB-3451) involving this same licensee, we affirmed count I, subcounts 1(a), 1(b), 1(c), 1(d) and 1(e) and reversed count I, subcounts 2 through 5 of the department decision. As a penalty of revocation had been imposed by the department on the total number of violations set forth in its decision, we

remanded the matter to the department for reconsideration of the penalty.

The department on August 4, 1971, issued its new decision which provides in part:

"DETERMINATION OF ISSUES PRESENTED

"Count I, Subcounts 1(a), 1(b), 1(c), 1(d), and 1(e): Grounds for the suspension or revocation of the license exist under Section 24200(a) of the Alcoholic Beverage Control Act, and within the meaning of Article XX, Section 22, of the California Constitution.

"Count I, Subcounts 2, 3, 4, and 5: These subcounts should be dismissed.

"ORDER

"Count I, Subcounts 1(a), 1(b), 1(c), 1(d), and 1(e): The license is suspended for 60 days with 30 days of said suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that

cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made the Director of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed portion of the penalty; and that should no such determination be made, the stay shall become permanent.

"Count I, Sbucounts 2, 3, 4, and 5: These subcounts are dismissed."

Appellant on September 2, 1971, filed a petition for reconsideration. The petition was denied by the department on September 7, 1971. Appellant's appeal was filed on September 10, 1971, and is based upon the following grounds:

"(a) The Department has proceeded without, and in excess of, its jurisdiction;

"(b) The decision is not supported by the findings;

"(c) That errors of law

were made by the Department, as reflected by the transcript of the proceedings;

"(d) The findings are not supported by substantial evidence in the light of the whole record."

This board has consistently held that in matters similar to the instant proceeding wherein we remand the case to the department for reconsideration of the penalty in light of our order, the licensee and all other parties are precluded from raising in their second appeal any issue foreign to the penalty question. It has been our position that our prior opinion constitutes the law of the case.

Appellant contends that the questions before this board are:

(1) Was the department required to afford appellant an opportunity to make oral or written argument before adopting its decision after appeals board decision.

(2) Is the department's power to suspend or revoke a license for conduct contrary to public welfare or morals

unconstitutionally broad when applied to speech and expression protected by the First Amendment.

(3) Was the department's finding that continuance of appellant's license was contrary to public welfare or morals supported by substantial evidence in the light of the whole record.

We do not agree that the above issues are before this board. In our opinion, the only issue before us is whether the department's new penalty assessment constitutes an abuse of discretion. In extensive argument appellant contends that the department acted outside its jurisdiction and did not proceed in the manner required by law and that the department failed to comply with the requirements of due process and with requirements of section 11517(c) of the Government Code when it adopted its decision without providing appellant with an opportunity to make oral or written argument.

Appellant also contends that this board has misconstrued its authority and that it has misapplied its cited authority for the

action it originally took in remanding this matter to the department for reconsideration of the penalty previously assessed by the department. In our opinion, appellant has mistakenly likened the appeals board to a superior court and argues that the appeals board does not have authority to make binding findings of fact whereas with respect to a statutory agency, the superior court is authorized to make findings of fact based upon the administrative record and that such findings are binding upon the agency. In these matters, it is necessary to recognize the fact that the superior court does not review decisions of the Department of Alcoholic Beverage Control. In reviewing decisions of the department, this board is confined to the substantial evidence test and where, as in the present case, we affirm in part and reverse in part, such action does not render the prior department's decision a nullity.

In this matter, this board remanded the case to the department for reconsideration of the penalty. Upon remand the department could accept the order of the appeals board or it could appeal the order by filing a

petition for writ of review under section 23090, Business and Professions Code. The department here chose to accept the appeals board decision and in accordance therewith issued its new penalty determination based upon the findings which were affirmed by the board.

In this matter, appellant has cited no authorities supportive of his contention that he is entitled to present argument to the department prior to the issuance of its new penalty order.

With respect to appellant's argument that the first decision of the appeals board rendered the department's decision a nullity, appellant contends in novel argument that the board's decision created a situation in which the department could not simultaneously adopt the hearing officer's proposed decision and also comply with the board's decision and that the department chose to proceed in the manner specified in section 11517(c) of the Government Code. Appellant argues that the department failed to comply with that part of section 11517(c) which provides "The agency itself shall decide no case provided

for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself."

In our opinion, section 11517(c), Government Code, does not here apply. As noted above, this board in its prior decision affirmed five items and reversed four items. We remanded the matter to the department for its reconsideration of its penalty determination which called for revocation of appellant's license. (Section 23085, Business and Professions Code.) As previously noted, the department upon receipt of the board's order did not appeal the order of reversal by filing a petition for writ of review. (Section 23090, Business and Professions Code.) The department had previously adopted the hearing officer's proposed decision and this included the counts affirmed by this board. Procedurally, the department after making its initial determination to accept the board's decision was then only interested in determining the appropriate penalty to be assessed. Its review of the record was confined to this single objective.

The department has now determined that appellant's license shall be suspended for 60 days with 30 days stayed upon conditions. We have considered appellant's argument on the penalty question. The record shows that the department has definitely reconsidered the penalty in accordance with our order. It is clear that the department in arriving at its new penalty determination has taken into consideration evidence pertaining to the subcounts affirmed by this board. Under the circumstances, we cannot say that there has been an abuse of discretion as a matter of law with respect to the penalty here imposed.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
January 11, 1972

APPENDIX E

Los Angeles, Cal. Feb 17 1972

TITLE (Poff) (A.B.C. Appeals Bd.) No. 39811

THE COURT: Petition for writ of review denied.

RECEIVED
FEB 18 1972
BERRIEN E. MOORE, INC.

CLAY ROBBINS, Clerk

APPENDIX F

CLERK'S OFFICE, SUPREME COURT
4250 State Building
SAN FRANCISCO, CALIFORNIA 94102

Mar 16 1972

DEAR SIR: I have this day filed Order ____

HEARING DENIED

In re: 2 Civ. No. 39811

Poff

vs.

ABC Appeals Board

Respectfully,

G. E. BISHEL
Clerk

487-19

F-1.